Tenaga Nasional Bhd v Tan Sooi Lek @ Tan Choon Guan & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(i)-53–09 OF 2021(P)
VERNON ONG, ABDUL RAHMAN SEBLI AND HASNAH HASHIM FFCJ
29 APRIL 2022

Public Utilities — Electricity — Electricity Supply Act 1990 ('ESA') — Whether Tenaga Nasional Bhd ('TNB') as licensee under ESA was entitled to obtain and enforce civil injunctive reliefs from court to enable it to carry out its public statutory duties under the ESA without interference — Whether public interest dictated that TNB should have that entitlement even though ESA allowed TNB to resort to other statutory remedies including criminal sanctions against persons who flouted the provisions of the ESA

The issue before the Federal Court in the instant appeal was whether the appellant ('TNB') as a licensee under the Electricity Supply Act 1990 ('the ESA') could resort to civil injunctive relief to help it carry out its statutory duties under s 13 of the ESA in circumstances where public interest demanded it or where it would harm public interest to await the process of criminal sanctions under s 37(12)(a) and (b) of the ESA to run its course. Section 13 of the ESA authorised TNB to enter upon any land at reasonable times to maintain, repair or upgrade its installations, and, in the process and for the purpose of carrying out such work, it could fell or lop trees, remove vegetation and do all other things that were necessary but causing as little damage as possible and paying full compensation to all persons interested for any damage thereby caused. Section 37(12)(a) and (b) of the ESA provided that without TNB's authorisation, no person could carry out any work or activity in the vicinity of any electrical installation in a manner that was likely to interfere with such installation or endanger any person or property and anyone who did so would be guilty of an offence that was punishable with a fine, jail term or both. In the instant case, TNB gave the relevant statutory notice to the first and second respondents that it intended to enter upon their land to upgrade two of its transmission towers that were situated there. The landowners refused access to TNB because they had rented part of the land to the third respondent who was carrying out vegetable cultivation on the rentice area at the site of the towers right below the high voltage lines. TNB filed a writ action against the respondents and then applied (vide 'encl 4') for the following reliefs: (a) a mandatory injunction ordering the respondents to forthwith allow TNB to enter upon the land to carry out maintenance, repair and/or upgrading works pursuant to s 13 of the ESA; (b) a mandatory injunction ordering the

respondents to immediately remove all plantation, equipment and other structures from the rentice area on the land; (c) if the respondents failed to comply with (b), a mandatory injunction ordering the respondents to allow TNB to immediately remove all plantation, equipment and other structures from the rentice area; and (d) a prohibitory injunction prohibiting the respondents from carrying out or being involved in any activities within the rentice area. The High Court only granted prayer (a) of encl 4 ex parte and for an interim period, pursuant to which TNB entered upon the land and carried out necessary works on the towers. TNB was not able to remove the vegetation cultivation, equipment and related structures from the rentice area. At the inter partes hearing of encl 4, the High Court dismissed encl 4 on the ground that it had become academic since the purpose of granting prayer (a) had already been achieved. This was despite TNB arguing that prayers (b), (c) and (d) of encl 4 had yet to be granted especially in the light of the fact that the respondents or their agents were carrying on an unauthorised activity in the rentice area that could potentially interfere with the electrical installations and power supply and also endanger people and property. TNB's arguments failed to find favour in its appeal to the Court of Appeal ('COA') which upheld the High Court's decision and further held that s 37(12)(a) and (b) of the ESA provided a sufficient remedy if TNB wished to pursue further action against the respondents. At the instant appeal hearing, TNB submitted that the courts below erred in finding that encl 4 had become academic once its work on the towers had been completed. TNB argued that its upgrading work under s 13 of the ESA could not be said to have been completed until it had removed the plantations and related structures from the rentice area as they concerned the carrying on of an unauthorised activity under the ESA. TNB argued that encl 4 was not rendered academic simply because criminal sanctions could be taken against the respondents under s 37(12)(a) and (b) of the ESA. The respondents, on the other hand, argued that the courts below were right in dismissing encl 4 because their right to property under art 13 of the Federal Constitution would have been infringed if encl 4 had been allowed in full.

Held, unanimously allowing the appeal, answering the leave questions in the affirmative and remitting the matter back to the High Court for encl 4 to be heard inter partes:

(1) The inter partes hearing of encl 4 was not rendered academic because: (i) the ex parte interim injunction TNB had obtained was not final but only provisional in fact and in law and was liable to be revoked or set aside at the inter partes hearing of encl 4. If the High Court, upon considering the merits of the case, found that the ex parte injunction should not have been granted in the first place, then it would be set aside and the party that applied for it might be called upon to honour its undertaking as to damages; and (ii) only prayer (a) of encl 4 was granted at the ex parte hearing. The question of whether the prayers (b), (c) and (d) ought to be

granted pending the trial of the action remained at large and was a question the High Court had to determine at the inter partes hearing of encl 4 (see para 42).

(2) The availability of criminal sanctions or other statutory remedy did not preclude the courts from granting injunctive relief especially when there was a plain breach of statute. There was no jurisdictional requirement that TNB had to first prosecute for the alleged offence. If the material before the court showed that the defendant would breach the law or continue breaching the law, it was open to the court in its discretion to grant an injunction straightaway. In cases where public interest was involved, the courts should not leave it to the criminal law to take its course, ie, wait until an offence had been committed, etc. Whenever Parliament had enacted a law and given a remedy for its breach, the High Court nevertheless always had a reserve power to enforce the law so enacted by way of injunction or declaration or other remedy. The High Court had jurisdiction to ensure obedience to the law whenever it was just and convenient to do so (see paras 29–30).

(3) The availability of criminal sanctions under s 37(12)(a) and (b) of the ESA was not sufficient to meet the objective of the injunctions sought by TNB as well as the public interest need. If a public utilities provider like TNB was given a statutory responsibility which it was required to perform in the public interest, then, in the absence of an implication to the contrary in the ESA, it was entitled to apply to the courts for an injunction to prevent interference with the performance of its public responsibilities. In short, TNB was not precluded from resorting to the courts for injunctive relief in aid of carrying out its statutory duties under s 13 of the ESA (see para 31).

[Bahasa Malaysia summary

Isu di hadapan Mahkamah Persekutuan di dalam rayuan ini adalah sama ada perayu ('TNB') sebagai pemegang lesen di bawah Akta Bekalan Elektrik 1990 ('ABE') boleh memohon relif injunksi sivil untuk menjalankan tugas berkanunnya di bawah s 13 ABE menurut kepentingan awam menuntutnya atau ianya akan menjejaskan kepentingan awam sementara menunggu proses sanksi jenayah di bawah s 37(12)(a) dan (b) ABE. Seksyen 13 ABE memberi kuasa kepada TNB untuk memasuki mana-mana tanah pada masa yang munasabah untuk menyelenggara, membaiki atau menaik taraf pemasangannya, dan, untuk tujuan menjalankan kerja-kerja tersebut, mereka boleh menebang pokok, mengeluarkan tumbuh-tumbuhan dan melakukan perkara lain yang perlu namun hanya boleh menyebabkan kerosakan yang sedikit dan harus membayar pampasan penuh kepada orang yang terjejas. Seksyen 37(12)(a) dan (b) ABE memperuntukkan bahawa tanpa kebenaran TNB, tiada seorang pun boleh menjalankan sebarang aktiviti di sekitar pepasangan elektrik dengan cara yang mungkin mengganggu pepasangan

tersebut atau membahayakan mana-mana orang atau harta benda tersebut dan sesiapa yang berbuat demikian melakukan suatu kesalahan yang boleh dihukum denda, hukuman penjara atau kedua-duanya. Di dalam kes ini, TNB memberikan notis statutori kepada responden pertama dan kedua bahawa mereka akan memasuki tanah mereka untuk menaik taraf dua menara transmisinya. Pemilik tanah enggan membenarkan TNB kerana mereka telah menyewakan sebahagian tanah kepada responden ketiga yang menjalankan penanaman sayur-sayuran di kawasan sewa di tapak menara tepat di bawah talian voltan tinggi tersebut. TNB memfailkan tindakan terhadap responden dan kemudian memohon (melalui 'lampiran 4') untuk relif berikut: (a) injunksi mandatori yang memerintahkan responden untuk segera membenarkan TNB memasuki tanah tersebut untuk menjalankan kerja-kerja penyelenggaraan, pembaikan dan/atau menaik taraf menurut s 13 ABE; (b) injunksi mandatori yang memerintahkan responden untuk segera mengeluarkan semua ladang, peralatan dan struktur lain dari kawasan di atas tanah tersebut; (c) jika responden gagal mematuhi (b), injunksi mandatori yang memerintahkan responden untuk membenarkan TNB dengan serta-merta mengeluarkan semua ladang, peralatan dan struktur lain dari kawasan tersebut; dan (d) injunksi larangan yang melarang responden daripada menjalankan atau terlibat dalam sebarang aktiviti di dalam kawasan sewa tersebut. Mahkamah Tinggi hanya memberikan prayer (a) lampiran 4 ex parte dan untuk tempoh interim, yang mana TNB memasuki tanah tersebut dan menjalankan kerja-kerja yang perlu di menara tersebut. TNB tidak dapat mengeluarkan penanaman tumbuh-tumbuhan, peralatan dan struktur yang berkaitan dari kawasan tersebut. Pada perbicaraan inter partes lampiran 4, Mahkamah Tinggi menolak lampiran 4 atas alasan bahawa ianya telah menjadi akademik kerana prayer (a) telah dibenarkan. Walaupun TNB berhujah bahawa prayer (b), (c) dan (d) lampiran 4 masih belum diberikan memandangkan responden atau ejen mereka menjalankan aktiviti yang tidak dibenarkan di kawasan tersebut yang berpotensi mengganggu pepasangan elektrik dan bekalan kuasa dan juga membahayakan manusia dan harta benda lain. Hujahan TNB tidak diterima di dalam rayuannya ke Mahkamah Rayuan ('MR') yang mengekalkan keputusan Mahkamah Tinggi dan selanjutnya berpendapat bahawa s 37(12)(a) dan (b) ABE memberikan remedi yang mencukupi sekiranya TNB ingin meneruskan tindakan selanjutnya terhadap responden. Dalam pendengaran rayuan ini, TNB menghujahkan bahawa mahkamah di bawah terkhilaf dalam memutuskan bahawa lampiran 4 telah menjadi akademik setelah kerja-kerja di menara tersebut telah selesai. TNB menghujahkan bahawa kerja-kerja menaik taraf di bawah s 13 ABE tidak boleh dikatakan telah siap sehingga ladang dan struktur yang berkaitan dari kawasan tersebut dikeluarkan kerana mereka bimbang menjalankan aktiviti yang tidak dibenarkan di bawah ABE. TNB berhujah bahawa lampiran 4 tidak akademik hanya kerana sanksi jenayah boleh dikenakan terhadap responden di bawah s 37(12)(a) dan (b) ABE. Responden, sebaliknya, berhujah bahawa mahkamah di bawah adalah betul dalam menolak lampiran 4 kerana hak mereka untuk

harta di bawah perkara 13 Perlembagaan Persekutuan akan dilanggar sekiranya lampiran 4 dibenarkan sepenuhnya.

Diputuskan, sebulat suara membenarkan rayuan, menjawab soalan-soalan kebenaran merayu dengan afirmatif and memerintahkan kes didengar semula di Mahkamah Tinggi untuk lampiran 4 didengar semula secara inter partes:

(1) Pendengaran inter partes lampiran 4 bukanlah akademik kerana: (i) injunksi interim ex parte yang diperolehi TNB tidak muktamad tetapi hanya sementara menurut fakta dan undang-undang dan harus diketepikan di dalam pendengaran inter partes lampiran 4. Sekiranya Mahkamah Tinggi, setelah mempertimbangkan merit kes tersebut, mendapati bahawa injunksi ex parte tidak sepatutnya diberikan pada mulanya, maka ianya akan diketepikan dan pihak yang memohonnya boleh dipanggil memenuhi perkara ganti rugi; dan (ii) hanya prayer (a) lampiran 4 dibenarkan di dalam perbicaraan ex parte. Persoalan sama ada prayer (b), (c) dan (d) harus diberikan sementara menunggu perbicaraan tindakan tersebut merupakan persoalan yang harus ditentukan oleh Mahkamah Tinggi pada pendengaran inter partes lampiran 4 (lihat perenggan 42).

(2) Kewujudan sanksi jenayah atau remedi statutori lain tidak menghalang mahkamah daripada memberikan relif injunksi terutamanya apabila terdapat pelanggaran undang-undang yang jelas. Tiada syarat bidang kuasa bahawa TNB harus terlebih dahulu mendakwa atas kesalahan tersebut. Sekiranya kes di hadapan mahkamah menunjukkan bahawa defendan akan melanggar undang-undang atau terus melanggar undang-undang, ianya terbuka kepada mahkamah mengikut budi bicaranya untuk memberikan injunksi dengan segera. Dalam kes-kes di mana kepentingan awam terlibat, mahkamah tidak boleh menyerahkannya kepada undang-undang jenayah untuk mengambil bidangkuasanya, iaitu, menunggu sehingga kesalahan tersebut telah dilakukan, atau sebagainya. Parlimen telah menggubal undang-undang dan memberikan remedi untuk pelanggarannya, Mahkamah Tinggi bagaimanapun sentiasa mempunyai hak untuk menguatkuasakan undang-undang yang digubal dengan cara injunksi atau pengisytiharan atau remedi yang lain. Mahkamah Tinggi mempunyai bidang kuasa untuk memastikan kepatuhan kepada undang-undang apabila ianya didapati lebih adil dan mudah untuk berbuat demikian (lihat perenggan 29–30).

(3) Kewujudan sanksi jenayah di bawah s 37(12)(a) dan (b) ABE tidak mencukupi untuk memenuhi objektif injunksi seperi dipohon oleh TNB serta keperluan kepentingan awam. Sekiranya kemudahan awam seperti TNB diberi tanggungjawab statutori yang perlu dilaksanakan demi kepentingan awam, maka, sekiranya tiada implikasi yang bertentangan

dengan ABE, mereka berhak memohon kepada mahkamah untuk mendapatkan injunksi untuk menghalang gangguan terhadap pelaksanaan tanggungjawab awam tersebut. TNB tidak dihalang daripada memohon kepada mahkamah untuk relif injunksi di dalam membantu menjalankan tugas statutorinya di bawah s 13 ABE (lihat perenggan 31).]

Cases referred to

Attorney General v Chaudry and another [1971] 3 All ER 938, CA (refd)
Broadmoor Hospital Authority and another v R [2000] 2 All ER 727, CA (refd)
Cooper v Whittingham (1880) 15 Ch D 501, Ch D (refd)
Guilford Borough Council v Hein [2005] EWCA Civ 979, CA (refd)
Manchester Corporation v Connoly and others [1970] 1 Ch 420, CA (refd)
Oakfield Enterprises Sdn Bhd v Tenaga Nasional Bhd [1998] MLJU 70; [1988] 1 LNS 430, HC (refd)
Runnymede Borough Council v Ball and others [1986] 1 All ER 629, CA (refd)
Setapak Tin Mines Syndicate Ltd & Anor v Khoo Nean Tee & Ors [1970] 2 MLJ 191, FC (refd)
Stafford Borough Council v Elkenford Ltd [1977] 2 All ER 519, CA (refd)
Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd [2000] 2 MLJ 133; [2000] 1 CLJ 695, CA (refd)
Tenaga Nasional Bhd v Ong See Teong & Anor (suing on their behalf and for all parties who are the owners or tenants of the Kampung Sungai Terentang — which was served with a notice under ss 13 and 16 of the Electricity Supply Act 1990) [2010] 2 MLJ 155; [2010] 2 CLJ 1, FC (refd)
Wychavon District Council v Midland Enterprises [1998] 1 CMLR 397, HC (refd)

Legislation referred to

Breeding of Dogs Act 1973 [UK]
Copyright Act 1842 [UK]
Courts of Judicature Act 1964 s 96
Electricity Supply Act 1990 ss 11, 13, 14, 16, 37(12), (12)(a), (12)(b)
Electricity Regulations 1994 regs 2, 43(i), (j)
Federal Constitution art 13
Local Government Act 1972 [UK]
Manchester Corporation Act 1962 [UK]
National Land Code s 425, 425(3)
Protection of Animals Acts 1911–1988 [UK]
Rules of Court 2012 O 29 r 1, 1(1), 1(2), 2B, 2BA, 3
Shops Act 1950 [UK] s 71(1)
Town and Country Planning Act 1971 [UK]

Appeal from: Civil Appeal No P-02(IM)(NCVC)-1471–07 of 2018 (Court of Appeal, Putrajaya)

Steven Thiru (with Ong Wee En, Sarah Hani bt Rohizam, David Mathew and Priscilla Lim) (Lim Huck Aik & Co) for the appellant.
Ramanathan a/l N Rengasamy Pillai (Ram Pillai & Assoc) for the respondent.

Vernon Ong FCJ:

INTRODUCTION

[1] This appeal concerns Tenaga Nasional Bhd ('TNB') a licensee under the Electricity Supply Act 1990 ('the ESA 1990'). It is about TNB's statutory power as a public utilities provider to enter upon any land in order to carry out maintenance, repair and upgrading works on its installations. TNB obtained an interim injunction on an ex parte application to direct the landowners to allow TNB to enter upon their land to carry out maintenance and upgrading works. TNB's application came up for inter partes hearing after the said works were completed by TNB. The High Court dismissed TNB's application at the inter partes hearing on the ground that it was academic because the works had been completed. The Court of Appeal agreed with the High Court. TNB obtained leave to appeal to the Federal Court on two questions of law which relates to whether TNB may resort to civil injunctive relief in the courts in aid of, or as a back-up or in addition to, the statutory powers under the ESA 1990. The salient facts leading up to this appeal are as follows.

BACKGROUND FACTS

[2] TNB wanted to upgrade two wooden transmission towers located on the first and second respondents' land. Pursuant thereto, TNB gave the relevant statutory notice to the first and second respondents of its intention to enter upon the land for that purpose. However, the first and second respondents refused TNB access to the two transmission towers on their land. It transpired that the first and second respondents had rented part of their land to the third respondent. The third respondent was carrying out vegetable cultivation on the rentice area (ie, the tract of land reserved for the use of TNB for access to and for maintenance of the transmission line and running below and along the length of the transmission lines). The vegetable cultivation was located in part of the rentice area of the towers, right below the high voltage cables. There were also wooden poles to support the vegetation as well as zinc fencing.

[3] Consequently, TNB filed a writ action in the High Court for mandatory injunctions to compel the respondents to allow TNB to enter upon the land and to remove all plantations, equipment and structures from the rentice area, and a prohibitory injunction to prohibit the respondents from carrying out any activities on the rentice area.

[4] In the interim, TNB filed an application (vide encl 4) in the High Court for interim injunctive relief. The application was heard ex parte and TNB obtained an interim mandatory injunction order directing the respondents to allow TNB to enter upon the land to carry out the necessary works and an ad-interim prohibition injunction prohibiting the respondents from carrying any activities within the rentice area on the land. Meanwhile, the High Court also fixed a date for the inter partes hearing of encl 4.

[5] Relying on the interim order, TNB's representatives attempted to enter the land to carry out works but were again denied entry to the land. A police report was then lodged by TNB after which TNB's workers were eventually allowed entry on the land. Although the necessary works were then carried out, TNB was, however, not allowed to remove the vegetation cultivation, equipment, or related structures in the rentice area.

[6] At the subsequent inter partes hearing of encl 4, the High Court dismissed encl 4 primarily on the ground that the application was academic as the works required had already been carried out. TNB's appeal against the High Court decision was unsuccessful. TNB's appeal to the Court of Appeal was dismissed as the Court of Appeal agreed that the inter partes hearing of encl 4 was academic and that sub-s 37(12)(a) and (b) of the ESA 1990 were sufficient to meet the objective of the injunctions sought and the public interest need.

TWO QUESTIONS OF LAW

[7] TNB was given leave to appeal to the Federal Court on two questions of law pursuant to s 96 of the Courts of Judicature Act 1964 ('the CJA 1964') on the grounds that the questions posed were of public importance. At the outset of the hearing before us, learned counsel for TNB intimated that the respondents were conceding to the two questions of law being answered in the affirmative, subject to the qualification that the appeal not be allowed. Learned counsel for TNB submitted that the respondents' position was incongruous because the appeal must be allowed if the two questions of law are answered in the affirmative. Learned counsel for the respondents confirmed that they were indeed conceding to the two questions of law being answered in the affirmative but maintained their stand that TNB's appeal should nevertheless be dismissed.

[8] Notwithstanding the common stand taken by both TNB and the respondents on the two questions of law, it must be emphasised that it is for this court and this court alone to determine the questions of law. This court is not bound to adopt the common position of the parties on their interpretation of s 13 of the ESA 1990 read in conjunction with sub-s 37(12)(a) and (b). The two questions of law are as follows:

Question 1

Whether TNB, as a licensee under the ESA 1990, may resort to civil injunctive relief in aid of carrying out its statutory duties under s 13 of the ESA 1990, regardless of the possibility of criminal sanction pursuant to s 37(12)(a) and (b) of the ESA 1990?

Question 2

Whether a public authority (such as TNB) may resort to injunctive relief(s) as a back-up to, or in addition to, statutory remedies/sanctions (such as that in sub-s 37(12)(a) of the ESA 1990) in circumstances where public interest necessitates it and/or where it would harm public interest to await the process of the statutory remedy/sanction?

[9] The two questions of law are interrelated as they relate to the issue of whether TNB may avail itself of civil injunctive remedies in the courts as an aid in the performance of its statutory duties under the ESA 1990. As such, we will take the two questions of law together. The provisions of s 13 and sub-s 37(12)(a) and (b) of the ESA 1990 are as follows:

Section 13

Whenever it is necessary so to do for the purposes of maintaining, repairing or upgrading any licensed installation or any part thereof, the licensee, or any person authorised by him in that behalf, may at all reasonable times enter upon any land on, under or over which supply lines have been laid, placed or carried, or upon which posts or other equipment have been erected, and may carry out all necessary repairs, and may, in the course thereof, fell or lop trees, remove vegetation and do all other things necessary to the said purpose causing as little damage as possible and paying full compensation in accordance with section 16 to all persons interested for any damage that may be caused thereby for which compensation has not already been assessed under section 11.

Sub-section 37(12)(a) and (b)

(a) No person shall without the lawful authority of the supply authority or the licensee, as the case may be, undertake any work or engage in any activity in the vicinity of any electrical installation or part thereof as may be prescribed, in a manner likely to interfere with any electrical installation or to cause danger to any person or property.

(b) Any person who contravenes this section commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding two years or to both.

SUBMISSIONS OF PARTIES

[10] Learned counsel for TNB submitted firstly that TNB's statutory duty and power under s 13 of the ESA 1990 is to maintain, repair and upgrade its installations. For that purpose, TNB exercises the following powers: (i) TNB may at all reasonable times enter any land under or over which its supply lines have been laid; (ii) TNB may carry out all necessary repairs; (iii) TNB '… may, in the course thereof, fell or lop trees, remove vegetation and do all other things

necessary to the said purpose, causing as little damage as possible ...'. Concomitant with the exercise of the statutory power, TNB is required to pay compensation to persons interested for any damage caused thereby under s 16 of the ESA 1990.

[11] Secondly, learned counsel submitted that the replacement of the wooden towers was an upgrading exercise falling under s 13 of the ESA 1990; that as part of that purpose, TNB may exercise the power to remove vegetation in the vicinity of the towers in question (*Tenaga Nasional Bhd v Ong See Teong & Anor (suing on their behalf and for all parties who are the owners or tenants of the Kampung Sungai Terentang — which was served with a notice under ss 13 and 16 of the Electricity Supply Act 1990)* [2010] 2 MLJ 155; [2010] 2 CLJ 1). Further, the exercise of power to remove vegetation under s 13 of the ESA 1990 would also include the removal of vegetation in the rentice area of the towers in question where there has been no permission from TNB for the cultivation of the land (Electricity Regulations 1994 (reg 43(i) and (j) read with reg 2). Until TNB is able to exercise the power to remove vegetation cultivated in the rentice area of the towers without TNB's permission, the purpose of upgrading under s 13 of the ESA 1990 would not have been satisfied and it cannot be contended that the upgrading has been exhausted. Moreover, as the cultivation of vegetation here was without TNB's permission, no compensation will be payable under s 16 of the ESA 1990.

[12] As such, the Court of Appeal erred in failing to appreciate and give effect to the aforesaid powers, when it found that the injunctions sought by TNB were academic because the initial upgrading works had been carried out. The Court of Appeal also failed to appreciate that TNB's duty and responsibility to maintain the licensed installations (including the rentice area) is continuous and was not exhausted when the upgrading works had been completed.

[13] Thirdly, the Court of Appeal failed to appreciate the public safety element involved in maintaining the rentice area below the supply lines, which remain extant as the vegetation and structures are still present on the land. The Energy Commission has warned that a flashover can occur if objects are located too near a live conductor, even if there is no direct contact with the conductor (Energy Commission's Guidelines on Wayleave for Electricity Supply Lines). As such, controlled activities within the transmission corridor, including the planting of vegetables may only be carried out with the lawful permission of TNB.

[14] As the vegetation cultivation activities and structures were clearly located in the rentice areas right below the supply lines, the injunctions sought under prayers (b), (c) and (d) are not redundant as TNB has the power and

responsibility to maintain the rentice area by removing the vegetation and other structures that would interfere with the operation of the supply lines. A

[15] Fourthly, it was submitted that the Court of Appeal erred in holding that the criminal sanctions under sub-s 37(12)(a) and (b) of the ESA 1990 were sufficient to meet the objective of the injunctions sought and the public interest need. The ESA 1990 prohibits work or activities in the vicinity of the electrical installation that is likely to interfere with the electrical installation or to cause danger to any person or property unless there is permission. In this case, it is not disputed that the respondents did not get permission from TNB for the cultivation of the vegetation in the rentice area of the two towers. B C

[16] Learned counsel argued that as a general principle, the existence of an offence and criminal penalty under s 37(12) of the ESA 1990 is not a bar to the granting of injunctions (*Cooper v Whittingham* (1880) 15 Ch D 501; *Stafford Borough Council v Elkenford Ltd* [1977] 2 All ER 519). The Court of Appeal's reliance on *Oakfield Enterprises Sdn Bhd v Tenaga Nasional Bhd* [1998] MLJU 70; [1988] 1 LNS 430 is misplaced as that case dealt with resort to s 14 of the ESA 1990 which entitles a person to require the licensee, to remove or alter the line, posts or equipment in certain circumstances. Injunctions can be obtained in aid of the performance of statutory duties and the exercise of statutory powers (*Broadmoor Hospital Authority and another v R* [2000] 2 All ER 727) and where injunctions will be granted where it will be effective to restrain unlawful operations from continuing (*Wychavon District Council v Midland Enterprises* [1998] 1 CMLR 397). As such, it was submitted that it was wrong for the Court of Appeal to hold that TNB's only remedy in respect of the unlawful conduct of the respondents in cultivating vegetation in the rentice area of the towers is in the criminal sanctions in sub-s 37(12) of the ESA 1990. For the aforesaid reasons, the two questions of law should be answered in the affirmative. D E F G

[17] In reply, learned counsel for the respondents argued that TNB's right to enter upon the land is only for a specific purpose corresponding to the necessary period. Having obtained the ex parte interim injunction, TNB had entered upon the land and had completed the necessary works. As such, the need for a mandatory permanent injunction becomes irrelevant. Further, it was argued that the granting of a permanent injunction against the respondents would infringe the respondents' right to property under art 13 of the Federal Constitution. The High Court and the Court of Appeal were therefore correct in holding that the hearing of encl 4 had become academic. Even if the two questions of law are answered in the affirmative, it will not change the outcome of the decisions of the High Court and the Court of Appeal that encl 4 had become academic. H I

A ANALYSIS AND DECISION

[18] The determination of these two questions of law may be considered in the light of the following observations. Firstly, TNB is authorised to enter upon any land where the supply lines are laid for the purpose of carrying out B maintenance, repair and upgrading works — this is TNB's statutory duty to maintain, repair and upgrade and TNB's statutory power to enter onto any land to perform its duty: s 13 of the ESA 1990. The exercise of this statutory duty and power by TNB is subject to the giving of the requisite notice(s) to the landowners of the land in question, and subject to the payment of C compensation for any damages occasioned thereby. Secondly, the ESA 1990 proscribes any work or activity in the vicinity of any electrical installation which is likely to interfere with any electrical installation or to cause damage to any person or property — the criminal sanctions: sub-s 37(12)(a).

D **[19]** Insofar as the construction of s 13 of the ESA 1990 is concerned, the Federal Court in *Tenaga Nasional Bhd v Ong See Teong* had opined that the public purpose factor necessitates that s 13 be read purposely in order that the contemplated works could be carried out expeditiously in the public interest. The Federal Court also observed that:

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(a) s 13 merely authorises the doing of the acts specified therein for the purposes of the ESA 1990;

(b) the purpose of ESA 1990 is, inter alia, to ensure the supply of electricity at reasonable prices to the public at large — the public interest element; F and

(c) where public interest is involved the balance of convenience in favour of the public in general must be looked at more widely.

G **[20]** In this light, we agree with submission of learned counsel for TNB that the respondents' right to the use of their land must be balanced with the public interest (*Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd* [2000] 2 MLJ 133; [2000] 1 CLJ 695; *Tenaga Nasional Bhd v Ong See Teong*). Given the danger posed to the public and the risk of a major disruption of electricity H supply, we are also inclined to agree with learned counsel for TNB that the public interest needs outweigh the respondents' individual rights to the use of their land within the rentice area.

[21] We now turn to the question of whether the criminal sanctions under I sub-s 37(12)(a) and (b) of the ESA 1990 is sufficient to meet the objective of the injunctions sought and the public interest need. Subsection 37(12) of the ESA 1990 makes it an offence for any person to carry out any unauthorised activity on a rentice area. Accordingly, any person who contravenes this proscription is liable to criminal sanctions — prosecution, trial, and if found

guilty, conviction and sentence to a fine and/or imprisonment: sub-s 37(12)(b). Does the existence of criminal sanctions under the ESA 1990 preclude TNB from seeking injunctive relief from the civil courts? This question appears to have been considered and decided in a number of English cases.

[22] In *Cooper v Whittingham*, the proprietors of an English copyright discovering a piracy by an American firm, sent notices to the agents in England of that firm not to distribute the copies complained of, and immediately afterwards brought an action against the agents for an injunction to restrain them from selling or importing for sale such copies in England. The importation for sale and to sell knowingly foreign piracies of copyright were offences under the English Copyright Act 1842. Jessel MR found that where a statute creates a new offence and imposes a penalty, the ancillary remedy by injunction may still be claimed. At p 506 of the report, he made the following observations:

> ... It was said that the 17th section of the Act created a new offence of importation and enacted a particular penalty, and it was argued that where a new offence and a penalty had been created by statute, a person proceeding under the statute was confined to the recovery of the penalty, and that nothing else could be asked for. That is true as a general rule of law, but there are two exceptions. The first of the exceptions is the ancillary remedy in equity by injunction to protect a right. That is a mode of preventing that being done which, if done, would be an offence. Wherever an act is illegal and is threatened, the court will interfere and prevent the act being done — and as regards the mode of granting an injunction the court will grant it either when the illegal act is threatened but has not been actually done, or when it has been done and seemingly is intended to be repeated.

[23] In *Stafford BC v Elkenford Ltd*, in contravention of the Shops Act 1950 a company held a market each Sunday on the land it owned. The market was conducted by letting pitches on the land to stallholders. The company attempted to disguise the nature of the operation by the device of a so-called club. The use of the land for a Sunday market also contravened the Town and Country Planning Act 1971 since planning permission for that user had been refused by the local authority. The local authority served an enforcement notice on the company but the company did not comply with the notice and appealed against it to the Secretary of State. A public inquiry into the use of the land for the market was pending. In addition, the local authority, in the exercise of its duty under s 71(1) of the Shops Act 1950 to enforce the provisions of that Act, prosecuted the company in the magistrates' court for contravention of that Act. The company and its directors were each fined and ordered to pay the costs of the prosecution. The company appeal to the divisional court against the conviction. Pending the appeal, the local authority applied to the Chancery Division of the High Court for an injunction to restrain the company from using the land as a retail market on Sundays. The judge granted the injunction

on the ground that unless an injunction was granted the company would continue, deliberately and flagrantly, to flout the provisions of the Shops Act. The company appealed to the Court of Appeal arguing that in the exercise of its discretion the court should not have granted the injunction because the remedies provided by the Shops Act had not been exhausted and pursued to finality. The company's appeal was dismissed by the Court of Appeal. Denning MR opined that when there is a plain breach of a statute, the authority concerned can take proceedings in the High Court before any other proceedings are even started. It is open to the court in its discretion to grant an injunction straightaway when the breach of the law is plain and there appears to be an intention by the defendant to continue with the breach (at p 206 of the report).

[24] In *Guilford Borough Council v Hein* [2005] EWCA Civ 979, the defendant had been keeping large numbers of dogs on her premises. She had been convicted on some eight occasions under the Breeding of Dogs Act 1973 and the Protection of Animals Acts 1911–1988. Two orders disqualifying her from having custody of dogs expired in August 2003, as a result of which the local authority became liable to return to her some 26 dogs it had removed from her custody in December 2001. Being apprehensive that the return of the dogs to the defendant would very likely lead to her commission of further offences, the local authority applied to the High Court under the Local Government Act 1972 for: inter alia, an injunction restraining her from keeping any dogs at her premises. The judge granted the injunction restraining the defendant from keeping any dogs at her premises. The defendant appealed against the injunction. The Court of Appeal dismissed the appeal and held that if the principal purpose of a local authority in seeking an injunction was to achieve that which could not have been achieved under the Local Government Act, it would not be for the civil court to provide a remedy. In seeking an injunction, the local authority had been performing its public duty to prevent the dogs from being subjected to suffering and/or its public duty to prevent a breeding establishment being run without a licence. The real question was whether the civil court should approach the matter on the basis that in that type of case it had to leave the matter to the criminal law, ie, wait until an offence had been committed, or whether, where it was obvious that a criminal offence would be committed which would involve suffering or serious disadvantage to those which the criminal law was designed to protect, the civil court should grant relief, preventing the criminal offence taking place.

[25] In *Wychavon District Council v Midland Enterprises* [1998] 1 CMLR 397, the High Court granted to the local authority a perpetual injunction restraining the defendant from using what used to be an airfield on Sundays for retail trading as an open-air market. Millett J cited with approval the Court of Appeal's opinion in *Runnymede Borough Council v Ball and others* [1986] 1 All

ER 629, that: (i) the essential foundation for the exercise of the court's discretion to grant an injunction is not that the offender is deliberately and flagrantly flouting the law, but the need to draw the inference that the defendant's unlawful operations will continue unless and until effectively restrained by law and that nothing short of an injunction will be effective to restrain them; and (ii) there is no jurisdictional requirement that the local authority must first prosecute for the alleged offence. The only jurisdictional requirement is that the court should have material before it from which it can conclude that unless an injunction is granted, the defendant will continue to defy the law.

[26] In *Broadmoor Hospital Authority and another v R* [2000] 2 All ER 727 (CA), the English Court of Appeal opined at para 25 that '[i]n relation to many statutory functions the power to bring proceedings can be implicit. The statutes only rarely provide expressly that a particular public body may institute proceedings in protection of specific public interests. It is usually a matter of implication. If a public body is given responsibility for performing public functions in a particular area of activity, then usually it will be implicit that it is entitled to bring proceedings seeking the assistance of the courts in protecting its special interests in the performance of those functions'.

[27] In *Manchester Corporation v Connoly and others* [1970] 1 Ch 420 (CA), caravans inhabited by gypsies (the defendants) began to occupy a cleared demolition site in the centre of Manchester belonging to Manchester Corporation. The corporation exercising its powers under the Manchester Corporation Act 1962, gave notice requiring them to remove their caravans from the site. The corporation arranged to have the caravans towed away but abandoned the plan to avoid a breach of the peace. The corporation then issued a writ in the Chancery Court seeking an interim injunction to restrain the defendants from entering or remaining on the site. The Vice-Chancellor who heard the motion granted the interlocutory injunction. The English Court of Appeal upheld the decision of the Vice-Chancellor to grant the interlocutory injunction despite the corporation having the power to tow away the caravans under the Act. It also held that as, on the facts, there was no likelihood of any defence succeeding at the trial, the Vice-Chancellor had been correct in exercising his discretion to grant interlocutory relief in the form of the injunction.

[28] Closer to home, in *Setapak Tin Mines Syndicate Ltd & Anor v Khoo Nean Tee & Ors* [1970] 2 MLJ 191 (FC), a landowner applied to the High Court to order a group of squatters to deliver up vacant possession to the landowner. The squatters argued that s 425 of the National Land Code ('the NLC') precluded the landowner from seeking the order for delivery of vacant possession and that the landowner should first have gone to the Collector to get them removed

from the mining land. Section 425 of the NLC empowers the Collector to remove from any land any person who, without lawful authority, occupies any land or part thereof. Subsection 425(3) further empowers the Collector to enlist the assistance of police officers in the exercise of its powers. The High Court dismissed the landowner's claim. The landowner succeeded in the Federal Court. The Federal Court held that even though s 425 of the NLC gives a landowner an additional remedy, that statutory provision does not prevent him from coming to court to have the unlawful occupiers ejected and that he does not first have to apply to the Collector to act under that section.

[29] It is quite clear from the above cited cases that the availability of criminal sanctions or other statutory remedy does not preclude the courts from granting injunctive relief especially when there is a plain breach of a statute. There is no jurisdictional requirement that TNB must first prosecute for the alleged offence. The only jurisdictional requirement is that the court should have material before it from which it can conclude that unless an injunction is granted, the defendant will breach the law or will continue with the breach of the law. It is open to the court in its discretion to grant an injunction straightaway when the breach of the law is plain and the illegal act has been done and seemingly is intended to be repeated or continued.

[30] In cases where public interest is involved, we do not think that the courts should leave it to the criminal law, ie, wait until an offence had been committed, or whether, where it was obvious that a criminal offence would be committed which would involve suffering or serious disadvantage to those which the criminal law was designed to protect. We are of the view that in relation to many statutory functions the power to bring proceedings in court is usually a matter of implication. As such, whenever parliament has enacted a law and given a remedy for the breach of it, nevertheless, the High Court always has a reserve power to enforce the law so enacted by way of an injunction or declaration or other remedy. The High Court has jurisdiction to ensure obedience to the law whenever it is just and convenient so to do (*Attorney General v Chaudry and another* [1971] 3 All ER 938 at p 947).

[31] For the foregoing reasons, we do not think that the criminal sanctions under sub-s 37(12)(a) and (b) of the ESA 1990 are sufficient to meet the objective of the injunctions sought and the public interest need. If a public utilities provider like TNB is given a statutory responsibility which it is required to perform in the public interest, then, in the absence of an implication to the contrary in the ESA 1990, it is entitled to apply to the courts for an injunction to prevent interference with its performance of its public responsibilities. In short, we are of the view that TNB is not precluded from resorting to the courts for injunctive relief in aid of carrying out its statutory duties under s 13 of the ESA 1990.

[32] Accordingly, the two questions of law are answered in the affirmative, that is to say: (i) TNB as a licensee under the ESA 1990, may resort to civil injunctive relief in aid of carrying out its statutory duties under s 13 of the ESA 1990 regardless of the possibility of criminal sanctions under sub-s 37(12)(a) and (b) of the ESA 1990; and (ii) that TNB may so do in circumstances where public interest necessitates it or where it would harm public interest to await the process of the statutory remedy under the ESA 1990.

THE KEY ISSUE IN THIS APPEAL

[33] At the heart of this appeal is the issue of whether the inter partes hearing of encl 4 is academic. It will be recalled that in the first instance, encl 4, the application in question was made ex parte by TNB due to the need for urgency. Such applications are prescribed under the Rules of Court 2012 ('the ROC 2012'). Order 29 r 1 of the ROC 2012 provides that an application for the grant of an injunction may be made by any party to a cause before or after the trial of the cause (O 29 r 1(1)), and that such application may be ex parte where the case is one of urgency (O 29 r 1(2)). If an ex parte injunction is granted, it will normally be limited to a period of 21 days necessary for the inter partes hearing of the application pending the trial of the action.

EX PARTE AND INTER PARTES

[34] Ex parte is a Latin expression which is used to signify something done or said by one person not in the presence of his opponent. In other words, ex parte applications are heard in the absence of the party against whom the order is sought. Ex parte orders are commonly sought in situation of urgency or where the purpose of the application would be frustrated if the other party were to have knowledge of the proceedings, and even, if necessary, before the writ is issued (Anandan Krishnan, *Words, Phrases & Maxims: Legally & Judicially Defined*, Lexis Nexis Vol 6E at para E0697; O 29 r 3 of the ROC 2012). In contrast, the legalese term inter partes refers to a hearing on notice to both parties. In this instance, both adversaries are given advance notice of the date and time of the hearing and are required to attend the hearing.

[35] Since an ex parte order is made in the absence of the opposing party and without the benefit of adversary argument, an ex parte order is not a final order. As such, an ex parte order is provisional only, as to both fact and law. It is for this reason that:

(a) the applicant is required to give an undertaking to the court as to damages: ie, to pay all damages caused to the defendant by the granting of the ex parte interim injunction if the order ought not to have been made;

(b) an interim injunction obtained on an application heard ex parte has a limited lifespan of up to 21 days only (O 29 r 2B);

(c) the opponent must be given notice of the ex parte interim injunction. The applicant must therefore serve the ex parte interim injunction on the opposing party within seven days of the order (O 29 r 2BA);

(d) the application must be set down on a date to be heard inter partes within 14 days from the date of the order (O 29 r 2BA) — ie, the application will be heard inter partes while the ex parte interim injunction is still subsisting; and

(e) at the conclusion of the inter partes hearing of the application, the court may set aside the ex parte interim injunction if it finds that the ex parte interim injunction ought not to have been made in the first place, or if there has been a change in the circumstances rendering the ex parte interim injunction redundant or unnecessary, the court may revoke the ex parte interim injunction. On the other hand, if the court finds that the granting of the ex parte interim injunction was justified in the circumstances and further of the view that it is necessary for the interim injunction to be continued, the court will make an inter partes interim injunction to continue until the trial of the action or until such time as the court sees fit and proper.

IS THE INTER PARTES HEARING OF THE APPLICATION ACADEMIC?

[36] In the light of the above principles, we now turn to the question of whether the inter partes hearing of encl 4 has become academic due to TNB having carried out and completed the maintenance and repair works at the land. In this regard, it is necessary to note that encl 4 contained the following prayers:

(a) a mandatory injunction ordering the respondents to immediately allow TNB to enter the land to carry out maintenance, repair and/or upgrading works pursuant to s 13 of the ESA 1990;

(b) a mandatory injunction ordering the respondents to immediately remove all plantations and all equipment and/or structures from the rentice area on the land;

(c) if the respondents failed to comply with (b) above, a mandatory injunction ordering the respondents to allow TNB to immediately remove all plantations and all equipment and/or structure from the rentice area on the land;

(d) a prohibitory injunction prohibiting the respondents from carrying out any activities or being involved in any activities within the rentice area on the land;

(e) that the costs of the application be borne by the respondents; and

(f) such further or other relief as the court deems fit.

[37] At the ex parte hearing of encl 4, the High Court allowed prayer (a) only. Armed with the ex parte interim injunction in prayer (a), TNB was permitted by the respondents to enter upon the land and to carry out the upgrading and maintenance works.

[38] It will be recalled that at the inter partes hearing of encl 4, the High Court dismissed the application primarily on the ground that the application was academic because the said works had already been carried out. The Court of Appeal took the same view.

[39] Learned counsel for TNB argued that the application was not academic because: (i) even though the necessary works were carried out, TNB was not allowed to remove the vegetation cultivation, equipment, or structures in relation to the said vegetation cultivation; (ii) TNB's statutory responsibilities under s 13 of the ESA 1990 to maintain the supply lines was a continuous one; (iii) the cultivation activities carried out within the rentice area on the land were not authorised and constituted an offence under s 37(12)(a) of the ESA 1990; and (iv) prayers (b), (c) and (d) were critical to protect public interest as the activities carried by the respondents could cause major electricity disruption as well as death or injury to civilians.

[40] On the other hand, learned counsel for the respondents contended that TNB's right to enter the land is only for a specific purpose corresponding to the necessary period. Since TNB had during the course of the ex parte interim injunction, entered and completed the necessary works, the need for a mandatory injunction becomes irrelevant. Pursuant to the ESA 1990, TNB can enter the land by issuing the necessary schedular notices with the assistance of the District Land Office at any time to ensure electricity supply to the national grid are maintained. Further, TNB's application for a permanent injunction would infringe art 13 of the Federal Constitution on the right to property. In short, since the necessary works had already been completed and there was no need for a permanent injunction the inter partes hearing of the application has become academic.

[41] As a general rule, an issue may be academic when the issue does not require answer or adjudication by court because it is not necessary to the case.

In such circumstances the question would be rendered hypothetical or moot as there is no live issue for the court to determine.

[42] Does the fact that TNB has carried out the necessary works on the land render the inter partes hearing of the application academic? We do not think so. We say this for the following reasons. First, the interim injunction obtained on an ex parte hearing of the application is not final; it is only provisional in fact and in law. As such it may be revoked or set aside. The circumstances under which such an order may be revoked, and/or set aside have already been described in para 35(v) above. Second, it will be recalled that there were altogether four main prayers in the application and that the High Court only granted prayer (a) at the ex parte hearing of the application. The question of whether the three other prayers (b), (c) and (d) ought to be granted pending the trial of the action remains at large. These questions should be determined by the High Court at the inter partes hearing. This leads to the third and most significant point. The ex parte hearing of an application for an interim injunction does not end with the granting of an interim injunction. There remains the question of whether the ex parte interim injunction ought to have been made in the first place. In order to determine that question, the court will have to consider the merits of the case at an inter partes hearing in the presence of both parties. If it transpires that the ex parte interim injunction ought not to have been granted, then the ex parte interim injunction will be set aside and the plaintiff may be called upon to honour its undertaking as to damages.

[43] In this connection, the fact that there are other prayers in the application which were not granted at the ex parte hearing of the application is not really material. By the same token, the inter partes hearing of an application is not rendered academic merely because the court has declined to hear the application which was filed on an ex parte basis if the court considers that the matter is not really urgent. Similarly, the inter partes hearing of an application is not rendered academic simply because the court had refused to grant an ex parte interim injunction at the ex parte hearing of the application. In such situations, the court will direct the plaintiff to serve the cause papers on the defendant for inter partes hearing on a date within two weeks from the filing date (see Pekeliling Hakim Besar Malaya Bil 4/2012 (CJM Circular No 4 of 2012)).

[44] Since the central issue in this appeal is whether the inter partes hearing of encl 4 is academic, we do not think that it is necessary to go into the merits or otherwise of TNB's application for interim injunction in encl 4. Ultimately, these are matters for the High Court to consider and decide on the merits with the benefit of adversary argument at the inter partes hearing of encl 4.

[45] For the foregoing reasons, the appeal is therefore allowed with costs. The matter is remitted to the High Court for the hearing of encl 4 on an inter partes basis.

Appeal unanimously allowed, leave questions answered in the affirmative and the matter remitted back to the High Court for encl 4 to be heard inter partes.

Reported by Ashok Kumar